IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 958

FORD MOTOR COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana,
Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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CITATION OF STATUTES

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OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is reported in the case of *Ford Motor Company v. Department of Treasury of the State of Indiana*, 141 Fed. (2nd) 24, and was rendered on March 4, 1944, and may also be found in the record, page 98. Certiorari was granted by this Court on May 29, 1944.

JURISDICTION

The jurisdiction of this Court was invoked on petition for certiorari under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Sec. 347.

STATEMENT OF THE CASE

This was an action commenced in the United States District Court for the Southern District of Indiana, Indianapolis Division, by the petitioner against the respondent, to recover taxes assessed against and paid by the petitioner for the years 1935, 1936, and 1937, under the Indiana Gross Income Tax Act of 1933 and under the same act as amended in 1937. The tax assessed, and for which recovery was sought, related to two classes of sales, referred to in the findings and in the proceedings as Class A sales and Class B sales. Class B sales related to transactions which involved petitioner's branch in the State of Indiana. A refund on this class of sales is not claimed. The "Class A sales" involve transactions considered by the petitioner to be wholly outside the State of Indiana, and are transactions made and concluded by petitioner's branches at a situs outside the State of Indiana, and on this phase of the controversy petitioner clings to its claim for a refund of the amount, including interest, actually assessed and paid on this particular class of sales, to-wit, the sum of $78,514.10 (R. 77). The District Court denied petitioner relief, and on appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed (*Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, 141 Fed. (2nd) 24), also see record here, page 98.

The petitioner's complaint is based on two theories, first, that the tax on the receipts of Class A sales sought to be recovered is invalid as in violation of the commerce clause, Article I, Sec. 8 of the Federal Constitution because laid upon receipts derived from interstate commerce and constituting an undue burden upon such commerce; and, second, that the assessment of the tax on receipts of Class A sales was illegal because the "source" of such receipts was not within the State of Indiana, as specifically required by statute (R. 2).

The supplemental complaint is based on the theory that, after this action was commenced, petitioner and respondent agreed on a refund of such taxes; therefore, an account stated arose between the parties (R. 26).

The facts were found by the District Court. The facts relating to the class of transactions here involved (Class A sales) may be summarized as follows:

Situs and Source of the Income Involved

Petitioner was a corporation foreign to the State of Indiana (R. 41). All of its products were manufactured outside the State of Indiana (R. 42) and sold by its branches located outside the State of Indiana to independent dealers located within the State of Indiana. These independent dealers sold to the ultimate consumer (R. 43). All of petitioner's dealers in Indiana involved in "Class A sales" were assigned to and allocated to various branches located in Louisville, Kentucky, Chicago, Illinois, and Cincinnati, Ohio (R. 42).

Orders for petitioner's products were forwarded by the dealers to and received by petitioner's branches outside

the State of Indiana (R. 49, 50). The products were manufactured to the specification of the dealer's order (R. 52) by petitioner's assembly plants whose situs were likewise outside the State of Indiana (R. 78). Due to the importance of the finding with regard to the actual delivery of the products to the dealer, we quote the finding which specifically relates to that subject. After finding the facts relating to the manufacture of the products ordered by the dealer, the District Court specifically found:

> "(f) The car then rolls off of the end of the line to the door of the assembly building where it is filled with gas and oil, and then is driven out of the plant by an employee of the plaintiff, and on the grounds of the plaintiff receives a short road test and a final check. It is then brought to the gate of the assembly branch and at that gate a representative of the independent truck-away company, or the dealer himself who is to receive the car checks the car with the car checker of the plaintiff. If the car is found to match the invoice, the checker of the plaintiff at gate signs the invoice on the line marked 'Initials of Car Checker.' The dealer or the independent truck-away company as agent of the dealer signs the invoice on the line marked 'Signature of Dealer (indicating receipt),' and dates his signature with the date that the car leaves the gate. The dealer, or the dealer's representative of the truck-away company, then gets into the car and drives it off of the plaintiff's property (R. 52).
>
> "(h) It has been a custom of long standing for the employees of the truck-away company to sign for the dealers as their agent. All dealers know of the practice, and have acquiesced fully in it" (R. 53).

The truck-away or convoy company referred to was not owned by the petitioner but was an independent carrier

(R. 56), and the risk of loss after the products left the gate of petitioner's assembly plant was on the carrier (R. 56).

The price for the products involved was either (1) paid in full before they left the gate of the assembly plant; (2) paid in whole or in part by finance papers executed before the products left the gate, by the dealer or a representative of the truck-away company who was authorized by written power of attorney to execute such papers by the dealer; or (3) by payment in cash to the truck-away company at dealer's place of business or by finance papers executed by the truck-away company as agent for the dealer after the products left the branch (R. 53). Although the price was not always paid in full before the car or truck, or other products, left the gate of the assembly plant

> "plaintiff looks to the truck-away company for payment in full" (R. 56).

Under the contract between the petitioner and its said dealers, title to its products was reserved until the price was paid but by further provisions of the contract it was agreed that:

> "but regardless of title remaining in the Company or having passed to Dealer, all shipments shall be at Dealer's risk from the time of delivery to carrier at place of shipment" (R. 45).

The trial court further found:

> "The collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were there-

upon subject to the further order and disposition by the plaintiff as its property" (R. 64).

Petitioner, in the first instance, paid the truck-away company's transportation charges, but under its contract with the dealers was reimbursed for freight charge from Dearborn on separate items set up on the invoice to cover the charge (R. 56).

In a few instances after invoices were made out to the dealer, and either before or after the car left the assembly plant gate, the car was re-allocated to another dealer on advice of a branch (R. 57-59).

Intermingled with the District Court's findings of fact are certain conclusions which are wholly repugnant to the specific facts otherwise found and heretofore recited, namely:

> "All of the gross receipts . . . upon which the taxes and interest were assessed and collected . . . were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana . . ." (R. 79-80).

And, further that in making collections the truck-away or convoy company was acting as the agent for the petitioner (R. 80).

The United States Circuit Court of Appeals, by its opinion and judgment held:

> "From these findings, it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but that every transaction in the sale, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana."

The Account Stated

During the pendency of this action petitioner, at the invitation of respondent, requested a rehearing on its claim for refund (R. 68-69). The claim was reviewed by the respondent on its merits, and on March 1, 1941, the hearing judge of the Department, who had authority and power to bind the Department (R. 39-40), by written opinion determined that:

> "The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above" (R. 75).

The transactions outlined in the opinion are described by the "hearing judge" in these words:

> "These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-State manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.
>
> "It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to those customers across State lines, nor does any obligation or responsibility to initiate such transportation

> across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembling plants outside of the State of Indiana.
>
> "It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction" (R. 74-75).

The amount of the award was not stated in the opinion, but the District Court found, as to "Class A" transactions, that, before the determination of the hearing judge aforesaid, counsel for both the petitioner and respondent, as well as the hearing judge, agreed:

> "that the $78,000 part of the claim had been audited and those figures agreed upon at the time it was paid". (R. 71)

Respondent, by answer filed in this cause before the determination of the hearing judge aforesaid, admitted that the amount assessed and paid (including interest) on account of

> "gross receipts from the sale of cars, trucks, and parts to dealers located within the State of Indiana where such payments or gross receipts and business was allocated by the plaintiff to its Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, branches"

("Class A Sales"), was the sum of $78,514.10 (R. 21). Later, on December 1, 1941, for the purposes of the trial, the parties stipulated that the amount of tax paid on account of those sales was $78,514.10. The Court further found:

> "This item of $78,514.10 was known and referred to by the parties in some of their discussions as the $78,000.00 claim, and was thus distinguished from the claim of $37,259.24, which was known and sometimes referred to by them as the $37,000 claim" (R. 66).

The amount of the claim was not at any time in dispute, and could not be more or less than the amount actually assessed and paid. The determination was never rescinded or withdrawn by respondents (R. 76).

Petitioner later, and during the course of the proceedings in the District Court, filed a supplemental complaint seeking recovery on the theory of an account stated.

Opposed to the foreging specific facts found or admitted are other statements which are included in the findings of fact as follows:

> "Defendant did not know what plaintiff's gross income from such transactions was when said order was issued . . ." (R. 77).
>
> "At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of $78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time" (R. 77).

The United States Court of Appeals in this cause further held:

> ". . . the alleged account stated was not found to be for any specific amount."

The determination made by the hearing judge was binding on the Department. In this respect the District Court found:

> "Elmer F. Marchino is the Hearing Judge of the Gross Income Tax Division of the Department of Treasury, and has been such continuously since May, 1933. As such, he hears and determines objections to proposed additional assessments of Gross Income Tax and petitions for the refund of Gross Income Tax. He has the power and authority to determine the facts involved on any notice of proposed assessment of additional tax or petition for refund of tax, and the right to determine, from a legal status, the policy of the Department" (R. 41-42).

The respondent's answer admitted:

> "The defendants admit that thereafter, and on March 1, 1941, the defendant Department of Treasury acquiesced in the plaintiff's petition for reconsideration of its ruling, and issued a second letter of finding, dated March 1, 1941, which read as follows: . . ." (R. 36).

(Then follows a copy of the letter relied upon in petitioner's supplemental complaint and referred to in the findings (R. 36).)

Respondent further admitted by its answer:

> "The defendants further answering paragraph '4' admit that on or about March 1, 1941, the defendants mailed the letter of findings reproduced above to the plaintiff" (R. 38).

Notwithstanding the foregoing specific findings of the trial court and the admissions of Respondent's answer, the Court of Appeals held:

> ". . . the hearing judge's later ruling was not approved by the department. . . . No one, who was authorized to do so stated an account. . . ."

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the "source" of petitioner's gross income from "Class A sales" was within the State of Indiana.

2. In holding that petitioner's gross income from sales made by it on orders received and accepted, goods manufactured and deliveries made to its dealers and their carrier agents, all done at a situs outside the State of Indiana, was subject to the imposition of the tax laid by Section 2 of the Gross Income Tax Law of the State of Indiana enacted in 1933, Burns' Indiana Revised Statutes (1933), Sec. 64-2602, and amendment thereto of 1937, Burns' Indiana Revised Statutes (1943), Sec. 64-2602, contrary to the local applicable decision of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. (2d) 150.

3. In holding that no account stated arose between petitioner and respondent as to "Class A sales," where the amount was not in dispute and respondent, upon a hearing upon the merits of the claim, made and issued to petitioner an order for the refund of the taxes involved.

4. In disregarding the specific facts found by the District Court and basing its decision solely upon conclusions of law of the District Court, intermingled with findings of fact, which are inconsistent with and repugnant to the specific facts found.

SUMMARY OF ARGUMENT

Validity of the Tax—Source of Income

The tax imposed by the Indiana Gross Income Tax Act of 1933 and as amended in 1937 is not a use tax but a tax imposed upon and measured by the amount of the gross income of the taxpayer.[1]

As to nonresidents of the state, the imposition of the tax is limited to the gross income which is "*derived from sources within the State of Indiana.*" Under the 1937 amendments of the Act, the gross income of residents of the state received from sources outside the state are exempted. (Appendix, pp. 29-30.) The decision of the court below is in conflict with the applicable decision of the Supreme Court of Indiana in the case of *Department of Treasury v. International Harvester Co.*, — Ind. —, 47 N. E. (2nd) 150,[2] because under the facts found by the trial court it can not be said that the source of petitioner's income was within the State of Indiana, since the orders were received and accepted outside the state, the goods manufactured outside the state, the price received outside the state and the goods delivered to the purchaser outside the state.

The statute involved does not even purport to lay a tax upon income produced from a source outside the state. If it had, it would be invalid because the commerce clause of the Federal Constitution precludes liability for a tax thus laid. (*McLeod, Commissioner, v. J. E. Dilworth Co., etc.*, 64 Sup. Ct. Rep. 1023, No. 311, decided May 15, 1944). Fur-

[1] Pertinent statutes and Regulations are set forth in Appendix, infra, pp. 28-33.

[2] *Department of Treasury v. International Harvester Co.*, was before this Court on appeal, No. 355, on questions other than sales of the character of "Class A Sales", there and here involved.

thermore, such a tax would be in violation of the Fourteenth Amendment to the Constitution. (*Hans Recs' Sons v. North Carolina* (1931), 283 U. S. 123, 131-132; *Guaranty Trust Co. v. Virginia* (1938), 305 U. S. 19, 23.)

The Account Stated

Under the findings of the trial court, the respondent, upon a hearing on the merits of petitioner's claim for a refund, determined that the petitioner was entitled to a refund by reason of the fact that the transactions producing the income involved occurred at a situs outside the state of Indiana. The amount of the refund was not in dispute, had been determined by an audit prior to the time the tax was assessed and was represented by the actual amount assessed and paid, being the sum of $78,514.10. The amount not being in dispute and respondent having determined this liability for a refund under the facts, an account stated arose between the parties. The court below erred in holding that no account stated arose under the facts found by the trial court.

ARGUMENT

Validity of the Tax—Source of Income

The question in this case, as it was in the case of *Department of Treasury v. International Harvester Co.* (Ind.), 47 N. E. (2nd) 150, is this—Was the source of petitioner's income derived from Class A sales within the State of Indiana? If the source of that income was within the State of Indiana, it was taxable; if it was not, then clearly the income was exempt under the language of the statute.

The court below, in distinguishing the case at bar from the International Harvester case, decided this question in the following language:

> "Thus it will be seen that in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana. In one case, we have a sale within Indiana, which is covered by the statute, and in the other, a sale without Indiana not covered by the statute."

Petitioner is obliged to challenge the statement of the court below as being in total disregard of the actual basic facts found by the trial court and the importance of these facts lead us to demonstrate the comparative facts in both cases.

In the Harvester case, orders were solicited in Indiana by representatives of the company. In this case no solicitation took place in Indiana. In the Harvester case the orders, though solicited in Indiana, were accepted by the taxpayer outside the state. In the case at bar orders for its products were forwarded by dealers to branches of petitioner outside

the State of Indiana and were accepted outside the state (R. 49, 50). In the Harvester case the goods were shipped to the purchasers in Indiana from branches, warehouses or factories located outside of Indiana. In the case at bar the products were delivered to the dealer or the dealer's agent immediately as they came off of the assembly line outside the state (R. 52). In the Harvester case the purchase price was paid to the outside branches (method not disclosed). In the case at bar the purchase price was either paid to the outside branches, in cash, before shipment, or was collected by an independent carrier and carried back and delivered to the petitioner's branches outside the State of Indiana (R. 53). In the Harvester case, by contract, title to the goods was retained until the purchase price was paid.[3] In this case title is reserved by the petitioner in its initial dealer's contract but in connection with the actual operation under that contract the court found that "plaintiff looks to the truck-away company for payment in full" and shipment was at buyer's risk (R. 56). In the Harvester case the taxpayer at all times had facilities for the manufacture and sale of the goods involved in the State of Indiana, whereas in the case at bar the petitioner had no facilities whatever with which to manufacture, and from which to deliver the goods involved within the State of Indiana. Thus, unless the specific facts found by the trial court are to be totally disregarded, the basic facts in both cases, as to the source of income, are parallel and indistinguishable, and, where the facts appear to be different, a stronger case is manifestly made for the exemption from the tax here than in the Harvester case. It is very clear that the court below, when it declared that the goods in-

[3] This fact does not appear on the face of the Indiana Supreme Court's opinion but is shown by the record and will not be disputed by respondent.

cluded in Class A sales were accepted and paid for in Indiana, disregarded the plain facts found by the trial court and thus it was able, on a bare unsupported statement, to distinguish the case at bar from the Harvester case. We confidently assert that in the administration of justice no court is at liberty to disregard facts to which all parties are definitely committed. When the trial court found, as it did, that "the dealer or dealer's representative of the truck-away company then gets into the car and drives it off of the plaintiff's property" outside the State of Indiana (R. 52), it will not do for the court to say that the goods were accepted in Indiana. When the findings of fact show that this same dealer's representative, an independent carrier, carries the price back to the outside branch entitled to receive the same "and were thereupon subject to the further orders and disposition by plaintiff as its property" (R. 64), it will not do for the court to say that the price was received by petitioner within the State of Indiana.

In the light of the positive record of the facts, it may be well understood why the dissenting judge below was obliged to write:

> "I am sorry to say that after mature consideration, I find it impossible to distinguish the facts here from those in *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150 (Ind). . . ."

It has been urged by respondent in the court below, and will probably be urged here, that the findings of fact also show that, in isolated instances, products were diverted in the course of transit to accommodate dealers so that urgent customers of the dealers might be satisfied, and that therefore control of the goods is thus demonstrated. In this

connection it is to be pointed out that rebillings for all purposes amounted to less than two per cent (R. 59). Rebillings on account of diversion represent only a small fraction of the two per cent and the actual percentage or number was not found. It does not appear that petitioner had a legal right to divert shipments in transit—only that it did so in a comparatively few instances. On the contrary, if the facts found by the trial court are to be accepted, as they must be, the delivery was made to the dealer or the truck-away company as its agent, outside the State of Indiana, and that "plaintiff looked to the truck-away company for payment in full" (R. 45). This being true, it is self-evident that petitioner actually had no further control over the property and no legal right to substitute consignees, and when it did so, the activity of so doing must have been accomplished by acquiescence of the dealers involved, for their accommodation, and not for the production of income on the part of the petitioner.

Of course it can not be intelligently urged that this slight activity, incident to the business of its dealers, not its own, legally constitutes the source of petitioner's income or an activity which produced the income and therefore overcomes all the basic elements of completed transactions outside the state. Nor can it be intelligently asserted that the taxing statute in question imposes a tax upon an activity of this kind, independently of whether it produced the income or not. The most that can be said is, that by reason of these isolated transactions, petitioner was engaged at least in some slight activity within the State of Indiana to accommodate a dealer. Even so, the Supreme Court of Indiana, in construing the statute in question, in the Harvester case supra, being confronted with the activity of the International Harvester Company in soliciting orders

in Indiana, and the argument that such conduct of business made its outside transactions taxable in Indiana, decided the question in the following language:

> "The appellants would have us construe the statute as exempting only income derived entirely from activities outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.'"

Respondent will no doubt also contend, as it has done before, that the reservation of title in the dealer's original contract with petitioner completely destroys the theory that title passed when the goods were delivered to the carrier outside the State of Indiana. We have already pointed out that this element was before the Supreme Court of Indiana in the International Harvester case and did not affect the exemption claimed and also that reservation of title cannot be said to constitute the source of the income. However, the facts in this case are stronger for the petitioner on this subject than in the case referred to. True, by agreement, title was contracted to be reserved until the price was paid, but the facts found show that, in the performance of this contract, the provision of the contract referred to was clearly waived, and that title in fact actually passed outside the state, for, if we accept the facts found by the trial court, the goods were delivered to the dealer's agent outside the state, without the payment of the price, and "plaintiff looks to the truck-away

company for payment in full" (R. 56). This being true in the actual performance which produced the income in question, the intent to pass title is clear.

In addition to the foregoing, it is pointed out that under the terms of the sale of the products involved, producing the income upon which the tax is here laid, there was no contractual obligation on the part of petitioner to deliver the goods to the dealers in the State of Indiana. On the contrary, the contract provides "The company will sell its products to the dealer f. o. b. Detroit, Michigan . . ." (R. 44); and further provides " . . . regardless of the title remaining in the company or having passed to the dealer, all shipments shall be at dealer's risk from the time of delivery to carrier at place of shipment" (R. 45). On the subject of freight, the contract provides "In addition to the payments hereinbefore specified, Dealer shall pay Company such amount as Company shall from time to time determine for freight, crating, boxing, packing, double-decking, loading, delivering, and other handling expense. On rail or boat shipments, Dealer shall be credited against the amount so fixed, in a sum equal to any freight actually paid by Dealer." (R. 44.)

Under these facts and under elementary rules, title to the goods passed upon delivery to the carrier outside the State of Indiana, and the very most that can be said with reference to the interest of petitioner in the goods, after delivery to the carrier as agent for the dealer, is that such a reservation represented merely a security interest in the property, and nothing more.

United States v. Andrews (1907), 207 U. S. 229; 46 Am. Jur., page 611, and authorities collected; Sec. 19, Uniform Sales Act;

Sec. 22, Par. (a) Uniform Sales Act;
Sec. 20, Par. (2) Uniform Sales Act;
Jones v. United States (1909), (C. C. 4), 170 Fed. 1;
Savannah Chemical Co. v. Grace & Co. (1923), 293 Fed. 145;
Maffei v. Ginocchio (1921), 299 Ill. 254, 132 N. E. 518;
The Pennsylvania Co. v. Poor (1885), 103 Ind. 553.

It therefore follows that since the goods were delivered to the independent carrier as the agent of the dealer outside Indiana, and since the carrier became responsible for the price, the things which the carrier did within the State of Indiana, in carrying the goods to the dealer and carrying back the price to the seller, were wholly the activity and the business of the carrier and not that of the petitioner. Such activity was not the "source" of petitioner's income for it did not produce it.

Compania General De Tabacos De Filipinas v. Collector of Internal Revenue (1929), 279 U. S. 306;
Comr. v. East Coast Oil Co., S. A., 85 Fed. (2nd) 322, (C. C. A. 5th 1936), Cert. Den. 299 U. S. 608.

In that view, petitioner had no activity whatever in the State of Indiana from which income was derived, and the Harvester decision of the Supreme Court of Indiana is controlling.

A portion of the income involved here accrued after the 1937 amendment of the 1933 Gross Income Tax Act.

The amendment of Section 2 of the act added the words "activities or businesses" and coupled them with the words "and any other sources within the State of Indiana," whereas the 1933 act used only the word "source." It is obvious that no actual change is made by the amendment. In any event, the income must be "derived" from activities in Indiana or be "derived" from "business in Indiana" or be "derived" from "other sources" in Indiana. The words "other sources" impresses the words "activities and businesses" as "sources" of income, nothing more. An activity or business which was a source of income was certainly included under the word "source" as used in the 1933 act. This seems to be too plain to be open for argument. If it is to be argued by respondent that under this amendment incidental activities of a business carried on at a situs outside of Indiana may be taxed as the source of income of non-residents, then it must, by such an argument, concede that the statute discriminates against non-residents, for the same amendment, as to residents of Indiana, provides:

> "(m) The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer . . . received from trades, businesses or commerce, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ." (Appendix, p. 29).

If the validity of the 1937 amendment is to be sustained, it can not be said that the act imposes a tax upon the income of a business or trade, situated and regularly carried on by non-residents at a legal situs outside the State of Indiana, and from activities incident thereto, because by the same act, the income of residents is exempted in the very language which would impose the tax on the income of non-residents produced in precisely the same way. In the case at bar, under the language of the statute, if a resident had conducted a business and made sales precisely as respondent did, it could not be claimed that a tax was imposed by the statute upon the resulting income. Since the statute can be construed as to avoid discrimination, it should be so construed, and if not, it should be stricken down on constitutional grounds, for Indiana may not so discriminate against non-residents.

Petitioner is not unmindful of the further finding by the District Court set forth on the face of the opinion below to the effect that the gross receipts "were received by plaintiff while it was engaged in business in Indiana and derived from sources within Indiana" but confidently asserts that this finding is an erroneous conclusion of law and does not overcome specific facts which, as a matter of law, impel a contrary conclusion.

United States v. Jefferson Electric Manufacturing Company (1933), 291 U. S. 386, 407;

Pike Rapids Power Company v. Minneapolis, etc. Company, 99 Fed. (2d) 902, Cert. Den. 305 U. S. 660;

Utter v. Eckerson (C. C. A. 9th 1935), 78 Fed. (2d) 307, 308.

There is also another finding relied upon by the Court of Appeals to the effect that the carrier, in making the collection of the price, did so as the agent of the petitioner. In view of the specific findings by the District Court that petitioner "looked to the truck-away company for payment in full" (R. 56) and "risk of loss was on the truck-away company" (R. 56) this statement in the finding would also appear to be an erroneous conclusion, contrary to the specific facts found, but, regardless of the character of the statement, whether a conclusion of law or an ultimate fact, the collection of the price by a carrier, as hereinbefore pointed out, can not correctly be said to be the "source" of petitioner's income under the statute as construed by the Indiana Supreme Court.

Account Stated

There is not the slightest doubt that respondent, in its official capacity, made a determination that the transactions involved here, which were the source of and produced the income in question, took place at a business situs outside the State of Indiana. The reading of the opinion of the hearing judge, set forth in the trial court's finding at pages 73, 74 and 75, admits of no other construction of the facts. This determination was made after the action was filed and was made on request for a rehearing made by petitioner at the suggestion and instigation of respondent. There is no suggestion or intimation that any fraud or concealment was involved, or that the investigation was incomplete. There is no suggestion that this determination was ever rescinded or in any manner modified. The trial court found to the contrary. (R. 76.) The answer admits that the written award was delivered to petitioner by respondent and no contention can be legitimately made

that the amount was at any time in dispute. As to the out of state transactions covered by Class A sales, nothing remained to be done except for respondent to do what it agreed to do, namely, "The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined abeve." (R. 75.)

The decision of the court below on this phase of the case turned, first, on the authority of the "hearing judge" to make a binding order, and, second, on whether the amount of the award must of necessity be stated in the award as some definite and certain amount. On the first point, the court below is believed by petitioner to have gone outside the record to make a determination to the effect that the "hearing judge" had no authority to make the order. The decision in this respect ignored the respondent's answer, the averments of which conceded that the order of the "hearing judge" was delivered by respondent to the petitioner. (R. 36.) This admitted fact takes out of the case any question as to the authority of the "hearing judge" for, regardless of the authority of the "hearing judge," the delivery by the respondent Department made the order authentic and binding. The Department was created by statute for the purpose, among other things, of determining and authorizing refunds, but even if this admission and the fact of delivery did not remove this question, the findings of fact by the District Court (R. 41) clearly stated, referring to the power and authority of the hearing judge, "He has the power and authority to determine the facts involved on any . . .petition for refund of taxes and the right to determine, from the legal status, the policy of the Department." Thus, when the court below determined that "the hearing judge's

later ruling was not approved by the Department," it went beyond the issues and clearly outside the record before it, and when it held that the hearing judge had no authority to make the order, it must, of necessity, have disregarded the specific findings of the trial court to the contrary, as well as the admission of respondent's answer. The plain language of the finding and the plain language of the answer refute the holding of the court below and completely sustain petitioner's contention that the minds of the parties met and that a contract resulted.

As to the second point, the court below determined that "the alleged account stated was not found to be for a specific amount." Therefore it was determined that there was no liability on the theory of an account stated. To make this determination the court below must have been obliged to disregard the District Court's finding of fact, namely, "that the Seventy-eight Thousand Dollar part of the claim had been audited and those figures agreed on at the time it was paid." (R. 71.) Since the amount was not in dispute, and since it could neither be more nor less than the amount assessed and actually paid on this class of sales, the designation in the award of the specific amount was not necessary to constitute an account stated.

Goodrich v. Coffin (1891), 83 Me. 324, 22 Atl. 217;
Cited with approval in United States v. Bertelsen & Petersen Engineering Co. (1939), 306 U. S. 276, 280;
Bonwit Teller & Co. v. United States (1931), 283 U. S. 258;
Woodworth v. Kales (6 C. C. A. 1928), 26 Fed. (2nd) 178.

Therefore the decision of the court below is clearly untenable and erroneous on this phase of the case.

CONCLUSION

Under the rule in the case of *Erie Railroad Co. v. Tompkins* (1938), 304 U. S. 64, and subsequent decisions of this Court, the decision of the Supreme Court of Indiana, construing, as it does, a local statute, is binding upon the Federal Court. The Supreme Court of Indiana, having construed transactions of the character here disclosed as not constituting a source of income within the State of Indiana, which is taxable under the Gross Income Tax Act of Indiana, should be followed and its decision applied in the case at bar.

It is further insisted by petitioner that the Department of Treasury of Indiana, having, after investigation and a full hearing, determined "that the entire responsibility of Ford Motor Car Company to the customer ceases at the time of the delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembly plants outside the State of Indiana," and the District Court, by its findings of fact, having confirmed that factual situation, respondent is precluded, on the facts and the law, from disputing its liability to keep the covenant which it made and delivered to the petitioner "to make the refund of the gross income tax paid on the transactions outlined above . . . "

If it be determined by the Court that neither position stated above is correct, then petitioner submits that the statute must be held invalid, not only because of discrimination between residents and non-residents of the state on the same subject matter but, on the authority of the case of *McLeod, Commissioner, v. J. E. Dilworth Co., et al.*, 64

Sup. Ct. Rep. 1023, No. 31, because if the statute imposes a tax upon transactions of the character here disclosed, it violates the due process and commerce clauses of the Federal Constitution. For Indiana "to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

It is respectfully submitted that this cause should be reversed, with a determination of the liability on the part of respondent to refund the full amount of the tax paid by petitioner on its Class A sales, amounting to the sum of Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents ($78,514.10), with interest from the date of payment of costs.

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

APPENDIX A

The Statute

Chapter 50, Acts of Indiana 1933

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency."

"Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the 'Gross Income Tax Act of 1933'."

. . . . . .

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income *derived from sources within the State of Indiana*, of all persons and or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Chapter 117, Acts of Indiana 1937

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment, and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency.

Be it enacted by the General Assembly of the State of Indiana:

Section 1. That this act may be cited as the 'Gross Income Tax Act of 1933.'

. . . . . .

(m) The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer . . . received from trades, businesses, or commerce, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ."

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and or domiciled in the State of Indiana, except as herein otherwise

provided; and upon the receipt of gross income *derived from activities or businesses or any other source within the State of Indiana*, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Regulations

Regulation 191. (*In force from May 1, 1933, to December 31, 1935.*)

"Any taxpayer having gross receipts derived from earnings or activities carried on entirely without the State of Indiana will not be required to include such receipts in any return already filed or to be filed prior to the time that the supreme court of the State of Indiana shall render a decision affecting the right of the State of Indiana to impose a tax thereon."

Regulation 193. (*In force from January 1, 1936, to June 30, 1937.*)

"Regulation 191 issued by the Department of Treasury respecting income derived by residents of Indiana from earnings, or from activities, carried on entirely outside the State of Indiana, is hereby revoked and the deferment privilege granted thereunder is hereby cancelled. Hereafter all income from activities from sources entirely outside the State of Indiana will be designated as 'taxable' or 'non-taxable'—the words 'deferable' and 'non-deferable' being no longer applicable to such income.

All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to report for taxation their gross income received on and after May 1, 1933, from all sources, including that derived from out of state sources and activities except where such gross income is derived from a business regularly carried on, the situs of which is outside the state; from real property situated outside the state; or from intangibles having a business situs outside of Indiana and such intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

For the purpose of fixing the taxable status of specific kinds of income, the following rulings are made as a part of this regulation with respect to the classifications set out.

. . . . .

4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.' "

Regulation 3500. (*In force from July 1, 1937, to end of period covered by this case.*)

"*Taxable and Non-Taxable Income Received from Sources in Other States.* All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to

report for taxation their gross income received from all sources, including that derived from out of state sources and activities except, (1) where such gross income is derived from a business regularly carried on, the situs of which is outside the state; (2) income from real property situated outside the state; (3) or income from intangibles having a business situs outside of Indiana and which intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

Note: Indiana has no reciprocal agreement with any other state whereby deductions or credits may be taken by either resident or non-resident taxpayers on account of income earned in other states or on account of taxes paid thereon to such other states.

For the purpose of fixing the taxable status of specific kinds of income, the following rules are made as a part of this regulation with respect to the classifications set out:

. . . . . .

RULE 4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.'"

Regulation 3600. (*In force from July 1, 1937, to end of period covered by this case.*)

"*Extent of Tax Liability of Non-Residents.* Section 2 of the gross income tax Act provides that the tax shall be imposed upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana. Since non-residents are entitled to the same annual exemption as residents, therefore they will be liable for making return of and payment of tax upon all gross receipts derived from Indiana sources in excess of $1,000 in any calendar year."